

"International criminal law is now an inherent part of world politics"

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Christoph Flügge Fr 6 Dez 2013

The International Criminal Tribunal for the Former Yugoslavia is celebrating 20 years since its inception, and the International Criminal Court has been in place for over ten years now. From your experience, what are the ICTY's and the ICC's main achievements?

The greatest achievement is that those institutions actually exist. That in and of itself is a great result, both politically and legally speaking. During the period of the cold war, such institutions were inconceivable. Therefore, their mere existence is evidence of immense progress. Of course, when the UN Security Council created the International Criminal Tribunal for the Former Yugoslavia, it was a jump into the deep end. Nobody knew how exactly such a tribunal was supposed to work. But ultimately, the tribunal has turned out to be a great success, and international criminal law is now an inherent part of world politics, even if historically speaking, it is still in its early stages and needs to be cared for.

So can it be said that the principles of individual criminal responsibility and its adjudication through courts is now an integral part of public international law?

„The end of impunity“ – that was the slogan of many political movements, particularly of many non-governmental organizations. This movement has fought for a long time in order to ensure that criminal liability is not restricted to the foot-soldiers standing at the front of a battle, but that those who bear the greatest responsibility due to their command positions are punished as well. Criminal liability must be conceived independently of the perpetrators' position or rank, and regardless of whether they are part of the army or the police forces, or whether they are politicians, including heads of state. In order to explain the effects of international criminal law, I like to compare it to domestic criminal law. Take Germany for example: Many crimes are committed. But not all of them are detected, and even less are subject of a criminal trial and a verdict. Yet, to imagine a society without criminal law and institutions such as courts or the Prosecution is impossible at the domestic level and would result in anarchy. This is now also true for the international level, even if we're still at the beginning. Material criminal law as well as criminal legal institutions – courts, the Prosecutor's Office – have been created. That is a decisive step. Of course, none of these mechanisms are perfect, but it's a good start, and I sincerely hope that they will continue to evolve.

A few weeks ago, the African Union [unsuccessfully tried](#) to defer the cases against Kenyan [President Uhuru Kenyatta](#) and his Vice President [William Ruto](#). Is this evidence of a politicization of international criminal law? Can law and politics be separated?

Once the international community puts into place institutions such as the International Criminal Court, states must realize that legal rules exist and they must accept these rules. That entails accepting the independence of institutions created by the international community. Of course, proceedings at the ICC can be triggered by the UN Security Council and if this trigger mechanism is used, initiating proceedings requires a political decision to begin with. In this sense, international criminal law certainly contains elements of political decision-making. Putting into place an ad-hoc tribunal, such as the ICTY, is a political decision.

But the proceedings themselves, and this is my firm belief, are not influenced by political considerations. I do not know of a single case where political influence would have had an immediate effect on the outcome of a trial. That's important in order to ensure a court's independence. An independent judiciary is a main prerequisite in order for criminal trials to work. I truly hope that states will realize that cooperating with and supporting such independent

courts is beneficial for them as well.

Many claim that international criminal law has a deterrent effect. Do you believe that international criminal law contains an element of prevention? Does it truly deter individuals from committing crimes?

International criminal law has made it more difficult for those states that used to freely offer asylum and secure access to property to former war criminals to continue with this practice. That is a result of the deterrence element. Once an individual is indicted by an international jurisdiction and is being prosecuted, states cannot simply offer protection to that person without fearing at least political consequences in the international arena. It's hard to tell whether there is a deterrent effect on individuals. But the same is true for domestic criminal law. A perpetrator at the domestic level won't be kept from committing a crime just because there is a threat of punishment. But at the same time, individual perpetrators might think: ultimately, there is a risk that I might be caught. This risk of capture does play a role, and since Pinochet was captured and subsequently tried, such a risk also exists at the international level. That is a great achievement. But it will certainly take much more time until international criminal justice works perfectly, if it will ever do so. No criminal justice system is flawless.

The work of the ICTY is coming to a close. What would be lessons learned, if any, for the work of future courts, especially the International Criminal Court?

I don't want to be pretentious and claim that everyone can learn something from our institution, from the ICTY. A major issue in our work surely are lengthy proceedings that often last for several years. I don't have any solution as to how to reduce the length of the proceedings, but that is certainly a problem. I hope that the International Criminal Court will find ways and means to speed up proceedings. That's especially important for the victims. Victims have a hard time accepting that war crimes were committed in the Former Yugoslavia twenty years ago, and several important trials are only happening now. That is difficult to explain. At the same time, I don't know how one could speed up this process. That's especially true for cases where alleged perpetrators evade capture and can only be detained after several years.

Victims' rights are playing an increasingly important role. The ICC has institutionalized victims' participation in the trials, and victims are entitled to compensation if they meet specific conditions set out in the Rome Statute. How can victims' rights and the requirements of a criminal trial be reconciled?

I'm actually quite happy that the ICTY has not institutionalized compensation and restitution for victims. The proceedings are so complex that providing restitution would be an additional burden. To be frank: we, as criminal judges from various origins, are not in a place to decide what an appropriate compensation would be. I doubt whether individual financial compensation is truly helping the victim. In my view, it is much more important for the international community to focus on reducing and eradicating the causes of conflict through improved infrastructure, education and good governance. Ultimately, prevention is what matters most. Of course, the idea of victims' rights is very important and should be endorsed. But I am skeptical whether existing mechanisms are adequate. It remains unclear whether those mechanisms can truly compensate victims.

Various international courts operate under different procedural standards. The ICTY is modeled after Anglo-American law and is dominated by adversarial proceedings. The ICC has been labeled as a 'compromise' between Anglo-American and continental law. The Special Tribunal for Lebanon allows for trials where the accused does not have to be physically present. Do you believe that the varying procedural standards are a challenge for an evolving international criminal procedure?

Each of these systems has advantages and disadvantages. At the European level, we have tried for quite some time to harmonize various domestic laws. But the European example also shows that there are quite fundamental differences between the various legal orders. It is difficult to harmonize Great Britain's criminal procedure with civil law systems. We still have a long road to go there. Since we're still at the beginning, it might not be a bad idea to try out different procedural rules. It would certainly be helpful – but maybe it's still a bit early – to do some in-depth

research on whether different procedural rules yield different outcomes. You could look at different criteria: Are different procedural rules more or less successful with regard to truth-seeking, fair trial, the length of trials? I am not in a position to make statements on other courts' procedural rules. But I do regret the fact that the ICTY's rules of procedure largely follow Anglo-American law, despite the fact that the conflict took place in a country with a longstanding civil law procedure. The parties, especially the lawyers and counsel from the region, had to work hard to acquaint themselves with the ICTY's procedural law. That is a bit problematic. It is preferable to stay close to regional legal traditions, also where procedural law is concerned. Of course, international human rights standards must be respected.

So there is much to be done in international criminal law – what's your vision for the next twenty years?

Maybe not a vision, but a hope: I truly hope that the international community will continue to expand the reach of international criminal law, despite the many critical voices. Ad-hoc tribunals such as the ICTY and the ICTR are limited in time. The same is true for hybrid tribunals: the Special Court for Sierra Leone has essentially finished its work. The ICC will stay. That's why I hope that no more states will try to back out of it. My vision would rather be that most, if not all, members of the United Nations fulfill their obligation to fight impunity. This entails acceding to the Rome Statute and supporting the ICC. I am hoping for more trust in those important institutions and the rule of law.

Questions by Hannah Birkenkötter

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